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Attorneys for Plaintiff MICHELLE T. WAHL,
on behalf of herself and all others similarly situated

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

MICHELLE T. WAHL, on behalf of
herself and all others similarly situated,

Plaintiff,

v.

AMERICAN SECURITY INSURANCE
COMPANY; and DOES 1-50, inclusive,

Defendants.

CASE NO.: C 08-00555 RS

CLASS ACTION

**PLAINTIFF'S MOTION FOR LEAVE TO
FILE A SUR-REPLY IN FURTHER
OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS**

DEMAND FOR JURY TRIAL

**Hearing Date: May 21, 2008
Time: 9:30 a.m.
Courtroom: 4**

1 Plaintiff, Michelle T. Wahl, by her undersigned counsel, hereby moves for leave to file a Sur-
2 Reply in Further Opposition to Defendant's Motion to Dismiss.

3 This Sur-Reply is necessary to address arguments Defendant raised for the first time in its Reply.
4 Good cause for authorizing a sur-reply is generally found where a reply brief raises new arguments for
5 the first time or cites cases which were not originally cited in the initial brief. *Altivion Inc. v. Konica*
6 *Minolta*, 2008 WL 2020593, * 1 n. 1 (N.D.Cal. 2008). Here, Defendant has revamped its arguments
7 by raising new case law and new arguments in its Reply Brief.

8 Plaintiff therefore respectfully submits that a Sur-Reply will allow Plaintiff to address this new
9 case law and argument in a meaningful way. Plaintiff's response to these newly minted arguments entails
10 specific reference to multiple documents and citation of several additional authorities that would make
11 presentation of this response at oral argument difficult and cumbersome without the aide of prior
12 briefing. Plaintiff's proposed Sur-Reply, which is only 5 pages in length, is attached.

13 WHEREFORE, Plaintiff respectfully requests that the Court grant Plaintiff leave to file the Sur-
14 Reply attached hereto. A proposed Order of Court is also attached.

15
16 Dated: May 14, 2008

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17
18 By: s/Joseph N. Kravec, Jr.
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PROOF OF SERVICE

STATE OF PENNSYLVANIA)
COUNTY OF ALLEGHENY) ss.:

I am employed in the county of Allegheny, Commonwealth of Pennsylvania, I am over the age of 18 and not a party to the within action; my business address is The 26th Floor Koppers Building, Pittsburgh, Pennsylvania 15219.

On May 14, 2008, using the Northern District of California's Electronic Case Filing System, with the ECF ID registered to Joseph N. Kravec, Jr., I filed and served the document(s) described as:

**PLAINTIFF'S MOTION FOR LEAVE TO FILE A SUR-REPLY IN FURTHER
OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

The ECF System is designed to automatically generate an e-mail message to all parties in the case, which constitutes service. According to the ECF/PACER system, for this case, the parties served are as follows:

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Attorneys for Defendant

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

I further declare under penalty of perjury under the laws of the United States that the above is true and correct.

Executed on May 14, 2008, at Pittsburgh, Pennsylvania 15219.

/S/ MARCIA Z. CARNEY
Marcia Z. Carney

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DEMAND FOR JURY TRIAL

**Hearing Date: May 21, 2008
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1 Plaintiff, Michele T. Wahl, submits this Sur-Reply for the limited purpose of addressing certain
2 new arguments and case law raised by Defendant, American Security Insurance Company ("ASIC") in
3 its Reply Memorandum of Points and Authorities in Support of Its Motion to Dismiss ("Reply"), and
4 states:

5 **I. Ms. Wahl Has Standing**

6 In her Response to ASIC's Motion to Dismiss, Ms. Wahl demonstrated that she had standing to
7 bring her claims on the ASIC policy because: 1) she is specifically named in the policy as a additional
8 insured; 2) ASIC admits that it provided at least \$138,000 of insurance coverage solely and directly to
9 Ms. Wahl since EMC, the only other party to the ASIC policy, could not legally obtain that coverage for
10 itself as it had no insurable interest in that amount; and 3) Ms. Wahl paid the premiums on the ASIC
11 policy. Pltf's Response, pp. 5-9.

12 In its Reply, ASIC, relying on newly cited cases, contends that the fact that Ms. Wahl is
13 specifically named in the ASIC policy is an irrelevant distinction for standing. ASIC Reply, pp. 2-3 . In
14 support of this contention, ASIC cites several inapplicable cases involving insureds or additional insureds
15 who were not specifically named in the policy contract, but rather were considered insureds or additional
16 insureds by virtue of being in the class of persons generally defined in the policy as being covered. *Id.*
17 Ms. Wahl previously cited *Royal Surplus Lines Ins. Co. v. Ranger Ins. Co.*, 100 Cal.App.4th 193, 200
18 (2002), in which the Court of Appeal found that an additional insured, such as Ms. Wahl, who is
19 ***specifically named*** in an insurance policy is a party to the policy that has standing to sue an insurer for
20 its breach of the policy contract. ASIC fails to cite any cases overruling *Royal Surplus* or holding that
21 a specifically "named" additional insured lacks standing. On this point, ASIC cites authority never relied
22 upon or cited in its main brief, including *Hatchwell v. Blue Shield*, 198 Cal.App.3d 1027, (1988). Reply
23 at p. 2. *Hatchwell*, however, has no application here because it involved a claim by a wife of a person
24 insured under a group policy of insurance. Here, by contrast, the Court is confronted with a first party,
25 not third party, contract. Ms. Wahl is a specifically named party whose property was specifically insured
26 by the contract of insurance. The *Royal Surplus* court certainly was aware of the 1988 *Hatchwell*
27 decision and its distinctions when its decision was rendered in 2002.

1 Shifting its position again, ASIC also contends in its Reply that her lender, EMC, not Ms. Wahl,
 2 paid the premiums on the ASIC policy so Ms. Wahl could not have suffered any injury from ASIC's
 3 failure to refund those premiums. ASIC Reply, pp. 2-4. Of course, this is belied by a fair reading of
 4 Exhibit E to the First Amended Complaint ("FAC"). Exhibit E is a letter from EMC to Ms. Wahl that
 5 states:

6 Enclosed is the insurance EMC Mortgage Corporation (EMC) has obtained on your
 7 behalf in accordance with our rights in the mortgage documents and/or Deed of Trust
 8 securing your loan. American Security Insurance Company now insures on your behalf
 the referenced property. The annual premium shown on the policy has been charged to
 your escrow account. If you do not have an escrow account, one has been established.

9 EMC's letter indicates that the ASIC policy premiums were paid from Ms. Wahl's "escrowed"
 10 funds that were merely held by EMC. As such, EMC simply acted as Ms. Wahl's agent to pay her
 11 escrowed funds to ASIC for policy premiums. *See Markowitz v. Fidelity National Title Co.*, 142 Cal.
 12 App. 4th 508, 526 (2006).

13 Moreover, EMC's letter states that it obtained the ASIC policy *on Ms. Wahl's behalf*, which
 14 also gives rise to a fair inference that EMC was acting as Ms. Wahl's agent to procure insurance for her
 15 from ASIC. That EMC procured insurance for Ms. Wahl's benefit from ASIC is further supported by
 16 ASIC's admission that at least \$138,000 of the total coverage was for Ms. Wahl's benefit alone since
 17 ASIC had no insurable interest in that amount. ASIC Opening Br., p. 10.

18 This principal-agent relationship between EMC and Ms. Wahl is significant for standing purposes.
 19 Indeed, it is well-established that:

20 Unless excluded by the terms of the agreement made by the agent, an undisclosed
 21 principal may claim the benefits of the contract and may sue or be sued in his or her own
 name.

22 *American Builder's Association v. Au-Yang*, 226 Cal.App.3d 170, 176 (1990)(numerous citations
 23 omitted). *Cf. Sunset Milling & Grain Co.*, 39 Cal.2d 773, 778 (1952)(applying rule to disclosed
 24 principals).

25 Here, the FAC shows that EMC acted as Ms. Wahl's agent to procure insurance from ASIC on
 26 her behalf, that ASIC specifically identified her as a named additional insured in the policy, and that the
 27 ASIC policy premiums were paid from Ms. Wahl's "escrowed" funds held by EMC. Accordingly, Ms.
 28

1 Wahl has standing to sue on the ASIC policy for her losses from ASIC's failure to refund premiums to
 2 her as expressly required by the ASIC policy. To the extent the Court has any question over the existence
 3 or extent of the agency at issue, it is a question of fact not appropriate for resolution on a motion to
 4 dismiss. *Frank Pisano & Assoc. v. Taggart*, 29 Cal.App.3d 1, 15 (1972) ("The existence of agency is
 5 generally a question of fact.").

6 **II. EMC Did Not Waive Its Farmers' LLPE Coverage Prior to Its Commencement.**

7 ASIC's Reply also presents the new, yet completely false, argument that EMC somehow
 8 undertook some act to waive coverage under the Farmer's Policy at or around January 27, 2006 by
 9 placing coverage with ASIC. Reply at 6. As the FAC demonstrates, no action was taken until much
 10 later to obtain the ASIC Policy, and even then the ASIC Policy was "back-dated."

11 It is axiomatic that for a waiver to occur a party must do an act in furtherance of a waiver. *Old*
 12 *Republic Insurance Company v. FSR Brokerage, Inc.*, 80 Cal.App.4th 666, 678 (2000) ("Waiver refers
 13 to the act, or the consequences of the act, of one side."). Without any act, there can be no waiver. *Id.*
 14 Here, the FAC shows that EMC took no action to procure substitute insurance for the Farmers' LLPE
 15 until March 4, 2006, some 5 weeks after the Farmers' LLPE took effect on January 27, 2006.

16 Indeed, Exhibit D of the FAC is a letter from EMC to Ms. Wahl dated April 3, 2006 and states:

17 The temporary insurance we secured is in the form of a sixty-day binder
 18 through American Security Insurance Company and is now 30 days old.
 This binder cannot be renewed.

19 . . .

20 If you do not provide us with proof of insurance coverage before the end
 21 of the binder period, we will be required to obtain a one-year policy on
 your property.

22 This letter is a clear admission that EMC took no act to procure substitute insurance before
 23 March 4, 2006 (30 days before the date of the letter). That ASIC chose to back-date the coverage to
 24 begin on January 27, 2006 is irrelevant since EMC took no act to place that coverage until March 4,
 25 2006. Indeed, had a claim been made before EMC placed the ASIC coverage on March 4, 2006, no
 26 ASIC coverage would have existed and the Farmers' LLPE coverage would have clearly applied. Thus,
 27 no waiver of the Farmers' LLPE coverage by EMC could have possibly taken place until EMC first acted
 28

1 to obtain substitute insurance on March 4, 2006. By then, the Farmers' LLPE had been in place for more
 2 than 5 weeks, which under the express terms of the ASIC policy caused the automatic cancellation of
 3 the ASIC policy and required premiums to be refunded. *See* Pltf's Response Br., pp. 11-16.

4 ASIC's Reply also relies heavily on the Farmers' LLPE cancellation provision, but that provision
 5 actually supports Ms. Wahl's claim. ASIC Reply, p. 6. The Farmers' LLPE provides that coverage for
 6 the lender, EMC, would continue after the January 27, 2006 cancellation date for at least 70 days,¹
 7 "unless an acceptable policy in renewal thereof with loss thereunder payable to the Lender in accordance
 8 with the terms of this Lender's Loss Payable Endorsement shall have been issued by some insurance
 9 company and accepted by the Lender." ASIC Reply, p. 6, *quoting* FAC, Ex. A ¶ 7 (Farmers' LLPE).
 10 This makes it quite clear that the Farmers' LLPE continued providing coverage until EMC first acted
 11 to procure coverage from ASIC on March 4, 2006, some 5 weeks after the Farmers' LLPE began
 12 providing EMC coverage on January 27, 2006.

13 Accordingly, the ASIC policy placed on March 4, 2006 that purports to provide back-dated
 14 coverage to January 27, 2006 automatically cancelled and required a premium refund by its express
 15 terms, since it provided coverage EMC already had under the Farmers LLPE. Ms. Wahl who paid the
 16 ASIC premiums has adequately stated a claim for ASIC's failure to cancel its policy and refund premiums
 17 to her.

18 Dated: May 14, 2008

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24 ¹ ASIC reference to the Farmers' LLPE cancellation provision misleadingly implies that the
 25 Farmers' LLPE coverage for EMC continues for only 10 days after cancellation. As explained in Ms.
 26 Wahl's Response Brief at pages 13 to 14, the Farmers' LLPE coverage continues for the lender for at
 27 least 70 days after the cancellation date of the policy since the LLPE requires a 60 day waiting period
 28 before Farmers' can send a cancellation notice to the lender and the lender has an additional 10 days
 thereafter to decide to keep the Farmers' policy before coverage terminates. Here, this means that
 Farmers' LLPE provided EMC coverage from at least January 27, 2006 to April 7, 2006.

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4 herself and all others similarly situated,

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6 v.

7 AMERICAN SECURITY INSURANCE
8 COMPANY; and DOES 1-50, inclusive,

9 Defendants.

CASE NO.: C 08-00555 RS

CLASS ACTION

[PROPOSED] ORDER

DEMAND FOR JURY TRIAL

10
11 AND NOW, this _____ day of _____, 2008, upon consideration of
12 Plaintiff's Motion for Leave to File a Sur-Reply in Further Opposition to Defendant's Motion to Dismiss,
13 it is hereby GRANTED. The Sur-Reply brief attached to Plaintiff's Motion is hereby deemed filed.

14
15
16
17 _____
Honorable Richard Seeborg